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CLERK OF SUPREME COURT

U. S.

Supreme Court of the United States

OCTOBER TERM, 1941.

1051
No. _____

A. J. JOHNSON ET AL, _____ *Petitioners,*

v.

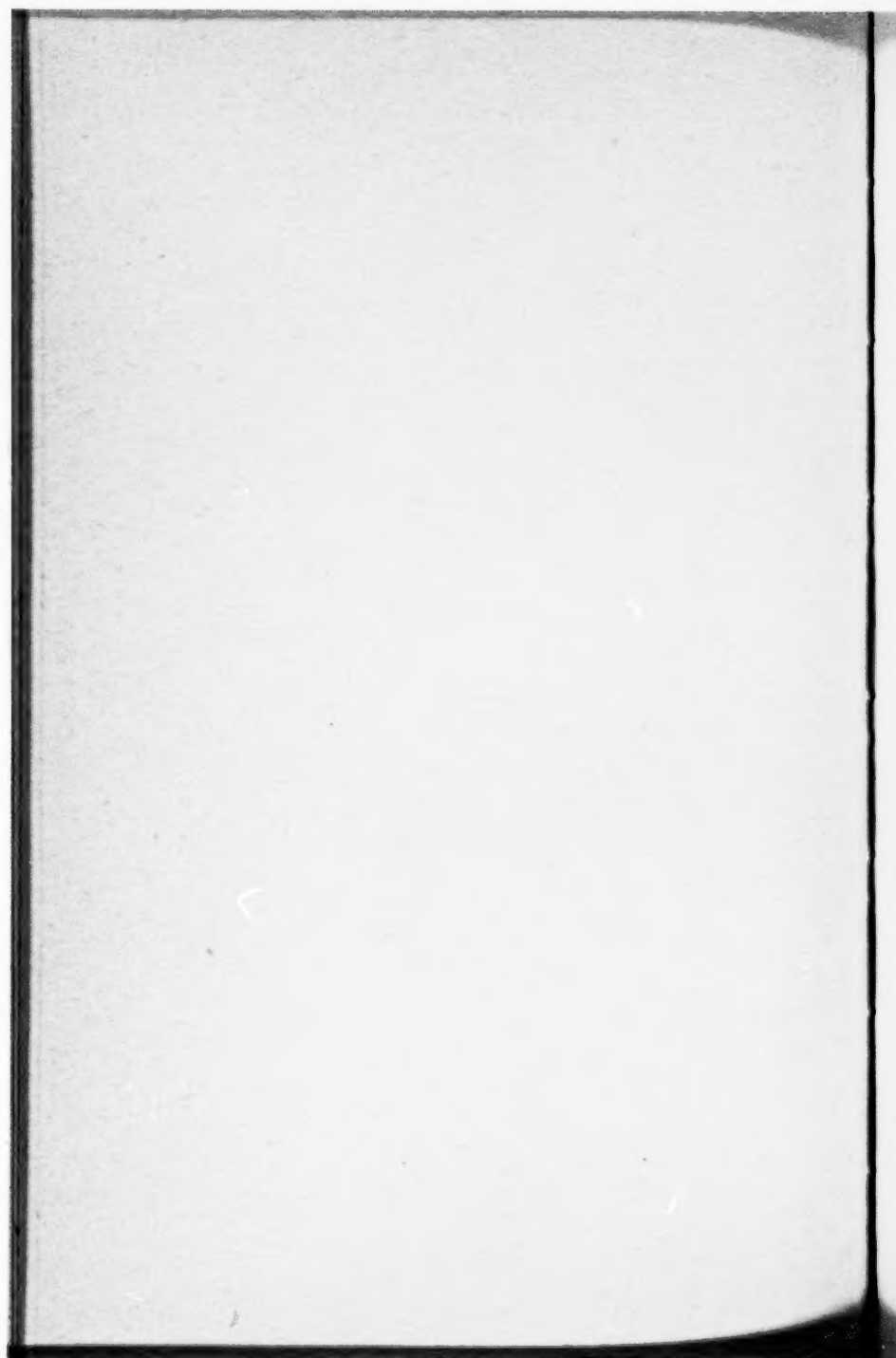
KERSH LAKE DRAINAGE DISTRICT ET AL, _____ *Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
ARKANSAS AND BRIEF IN
SUPPORT THEREOF.**

EDWARD W. BROCKMAN,

CHARLES T. COLEMAN,

Counsel for Petitioners.



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No.

A. J. JOHNSON ET AL, *Petitioners,*

v.

KERSH LAKE DRAINAGE DISTRICT ET AL, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Your petitioners are landowners in the Kersh Lake Drainage District, and were the appellees in the consolidated cases of *Kersh Lake Drainage District v. Johnson*, No. 6332, and *State Bank & Trust Company v. Holthoff*, No. 6474, in the Supreme Court of Arkansas, and they

pray this court for the issuance of a writ of certiorari to that court, which is the court of last resort in that state, to review a final judgment of that court reversing a decree of the chancery court of Lincoln county which held that the decision and judgment of this court in *Kersh Lake Drainage District v. Johnson*, 309 U.S. 485, was *res judicata* of the question of liability for further taxes of land-owners who had fully paid the benefits assessed against their lands.

Your petitioners respectfully show that the Supreme Court of Arkansas denied full faith and credit to the judgment of this court in the case referred to, in violation of Article 4, section 1, of the Constitution of the United States, and in violation of section 905 of the Revised Statutes, 28 U.S.C.A., section 687; that it refused to obey the mandate of this court; and that it decided a federal question of substance in a way probably not in accord with applicable decisions of this court.

Summary Statement of the Case.

This case involves proceedings in the state courts of Arkansas following the filing in those courts of the mandate of this court in *Kersh Lake Drainage District v. Johnson*, 309 U.S. 485, 60 Sup. Ct. 640, which proceedings resulted in a decision of the Supreme Court of Arkansas directly contrary to the decision of this court, and in a judgment of that court which denies full faith and credit to the judgment of this court. The facts are as follows:

The *Kersh Lake Drainage District* was organized in 1912 under a general drainage statute of the State of Arkansas. (Acts of 1909, p. 829).

The district let a contract for the work at the price of \$135,000.00, to be paid for by the issuance to the contractor of that amount of bonds of the district, payable serially over a period of 20 years, and bearing interest at the rate of 6% per annum. The estimated cost of the improvement was as follows:

Bonds,	\$135,000.00
Interest on bonds for 20 years,	112,983.74
10% for contingencies,	24,798.38

Total cost of construction \$272,782.12

A total tax of \$272,782.12 was levied on the lands in the district, payable in annual installments over a period of 20 years in proportion to the assessments of benefits.

After the district was organized the legislature passed acts which provided that assessments of benefits should bear interest at the rate of 6% per annum. (Acts of 1913, p. 738, and Acts of 1919, p. 343).

In 1931, A. J. Johnson brought a suit against the district in the chancery court of Lincoln county in which he alleged that he had paid installments of taxes on his lands in a total amount exceeding the benefits assessed against them, and asked that the district be enjoined from collecting further taxes on them. The chancellor held that the acts of 1913 and 1919 did not apply to this district because they were passed after the district was created, and he granted a perpetual injunction. There was no appeal. This decree is known in the record as the *Johnson* decree.

In 1932, Clyde E. Fish and other landowners who had paid their assessments in full brought a similar suit in

the same court. The chancellor suggested that as it was a class suit, an audit should be made to ascertain what lands had paid out in full and what lands had not. An audit was made and filed with the court, and the court rendered a decree, based on the audit, enjoining the collection of further taxes on the former lands, and adjudicating the balance due on the latter. There was no appeal. This decree is known in the record as the *Fish* decree.

More than five years afterwards the United States Circuit Court of Appeals for the Eighth Circuit, in *Kersh Lake Drainage District v. State Bank & Trust Company*, 92 Fed. (2d) 783, held that the acts of 1913 and 1919 applied to the district "prospectively so as to authorize the collection of interest from the date of their enactment upon deferred installments of benefits assessed under the previously existing law."

After the rendition of this decision the bondholders, the present respondents, brought a suit in the Lincoln chancery court, in the name of the Kersh Lake Drainage District, to collect interest on all the original assessments of benefits. The landowners who were the plaintiffs in the *Johnson* and *Fish* suits pleaded the decrees in those cases as *res judicata* of their non-liability for further taxes. The court rendered a decree in accordance with the prayer of the complaint.

The Supreme Court of Arkansas reversed the decree, holding that the *Johnson* and *Fish* decrees were *res judicata*. The court said:

"In this case the appellee drainage district has sued appellants for drainage taxes alleged to be due from them to the district. These appellants defend upon the ground that they have already paid in full

all the tax benefits assessed against their lands and that they have done all that the law requires of them. In support of their position, appellants set up specifically, as *res judicata* of the issues here, the former decrees in 1931 and 1932, *supra*, in the same court from which this appeal comes, in which the same parties were involved, involving the same taxes, and in which it was adjudicated that they had paid in full the taxes lawfully assessed against them. They insist, and we think correctly so, that these decrees in a suit between the same parties, involving the same issues and the same subject-matter, are *res judicata* of the questions involved in the instant case."

Johnson et al v. Kersh Lake Drainage District,
198 Ark. 743, 749.

At the instance of the bondholders, the present respondents, this court granted a writ of *certiorari* to review the judgment of the Supreme Court of Arkansas. The bondholders made four contentions in this court:

1. The State court failed to give full faith and credit to certain decrees rendered by the District Court of the United States for the Eastern Division of the Eastern District of Arkansas in litigation between the bondholders and the drainage district.

2. The bondholders were not parties to the *Johnson* and *Fish* suits, and were not bound by the decrees in those suits.

3. The bondholders had no notice of the *Johnson* and *Fish* suits, or of the decrees rendered in those suits.

4. The *Johnson* and *Fish* decrees were obtained by fraud and collusion.

This court held:

1. The bondholders were not entitled to be made parties to the *Johnson* and *Fish* suits.

2. The laws of Arkansas did not require that notice of such suits should be given to the bondholders.

3. The *Johnson* and *Fish* decrees are *res judicata* of the question of the liability of the landowners for further drainage taxes.

4. The record did not reflect any evidence of fraud or collusion in obtaining the *Johnson* and *Fish* decrees.

5. The determination by the state chancery court of the liability of landowners for further drainage taxes did not deprive the bondholders of their property without due process of law, notwithstanding the fact that the bondholders were not made parties to the suits and had no notice of the proceedings.

This court affirmed the judgment of the Supreme Court of Arkansas.

Kersh Lake Drainage District v. Johnson,
309 U.S. 485, 60 S. Ct. 640.

The bondholders filed a petition for a rehearing which was denied.

Kersh Lake Drainage District v. Johnson,
309 U.S. 699, 60 S. Ct. 886.

Thereupon this court issued its mandate to the Supreme Court of Arkansas in words as follows:

“Whereas, lately in the Supreme Court of the State of Arkansas, before you, or some of you, in a cause between A. J. Johnson, Appellant, and Kersh Lake Drainage

District, Appellee, No. 5501, wherein the judgment of the said Supreme Court, entered in said cause on the 29th day of May, A.D. 1939, is in the following words, viz:

'This cause came on to be heard upon the transcript of the record of the chancery court of Lincoln county and was argued by solicitors; on consideration whereof it is the opinion of the court that there is error in the proceedings and decree of said chancery court in this cause, in this: The court erred in holding the lands of appellant subject to an additional tax.

'It is therefore ordered and decreed by the court that the decree of said chancery court in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs; and that this cause be remanded to said chancery court with directions to enter a decree not inconsistent with the opinion herein delivered.

'It is further ordered and decreed that said appellant recover of said appellee all his costs in this court in this cause expended, and have execution thereof, Smith, McHaney and Baker, JJ., dissent.'

"And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-nine, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

"On Consideration Whereof, It is ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause be, and the same is hereby, affirmed with costs. (March 25, 1940).

"And the same is hereby remanded to you, the said Judges of the said Supreme Court of the State of Arkansas, in order that such proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of *certiorari* notwithstanding."

The Supreme Court of Arkansas in turn issued its mandate to the chancery court of Lincoln county in accordance with the mandate of this court.

When the mandate was filed in the chancery court the bondholders, the present respondents, attempted to start proceedings all over again as if nothing had been decided or determined.

On July 10, 1940, they filed in the chancery court an amendment to the original complaint in the *Fish* suit (the final decree in that suit was rendered June 15, 1932) by which they sought to eliminate certain lands from the *Fish* decree.

On September 24, 1940, they filed a new suit in the chancery court to annul the decree of June 15, 1932, in the *Fish* suit. They attacked the *Fish* decree on the following grounds:

1. The bondholders were not made parties to the suit, and had no notice of its pendency.
2. The commissioners of the district were also land-owners, and as such had a personal interest in the result of the suit.

3. For this reason the decree was procured by fraud practiced on the court.

4. The bondholders were prevented by unavoidable casualty from prosecuting an appeal from the decree.

The defendants, the present petitioners, pleaded the judgment of this court in bar of the proceeding, and the entire record in *Kersh Lake Drainage District v. Johnson*, 309 U.S. 485, 60 S. Ct. 640, was filed in support of the plea.

The chancery court entered a decree in conformity with the mandate of this court. It dismissed the so-called amendment to the complaint in the *Fish* case, and it dismissed the complaint in the new suit brought by the bondholders.

The bondholders appealed both cases to the Supreme Court of Arkansas, where they were consolidated and disposed of in one opinion. The court reversed the decree of the chancery court, and directed that court to enter a decree setting aside and nullifying the decree in the *Fish* suit, and to proceed with the collection of additional taxes on the lands involved in that suit.

The petitioners, in apt time, filed a petition for a rehearing on the ground that the Supreme Court of Arkansas denied full faith and credit to the opinion and judgment of this court, in violation of Article 4, section 1, of the federal constitution, and in violation of section 905 of the Revised Statutes, 28 U.S.C.A., section 687, and on the ground that it refused to obey the mandate of this court.

The Supreme Court of Arkansas is the highest court of the state in which a decision of the case could be had.

II.

Reasons Relied on for the Allowance of the Writ.

A.

When the mandate in *Kersh Lake Drainage District v. Johnson*, 309 U.S. 485, reached the chancery court of Lincoln county, that court had no authority, without the express leave of this court, to permit the pleadings to be amended, or to review or rehear the cause on the merits, or to entertain a suit in the nature of a bill of review bringing in matter that was or could have been litigated in the former case. The sole authority of that court was to enter a decree in conformity to the mandate of this court.

The chancery court entered such a decree, which was to the effect that the decree in the *Fish* suit was *res judicata* of the question of the liability of landowners for further taxes, and that no further taxes could be collected from them. The Supreme Court of Arkansas reversed this decree, and ordered the chancery court to set aside the *Fish* decree, which this court had sustained, and to proceed with the collection of further taxes, thereby nullifying the mandate of this court, and directing the chancery court to refuse to obey it.

B.

This court held in *Kersh Lake Drainage District v. Johnson, et al*, 309 U.S. 485, 60 Sup. Ct. 640, which was a suit between the same parties who are parties to the present record, that the decree of the chancery court of Lincoln county in *W. A. Fish, et al v. C. H. Holthoff, et al*, rendered June 15, 1932, was *res judicata* of the non-liability of landowners in the drainage district who had paid

their assessments of benefits in full for interest on the assessments. The Supreme Court of Arkansas holds that the judgment of this court is not *res judicata* of that issue.

C.

This court held that the respondents, who own the bonds of the district, were not entitled to be made parties or to become parties to the *Fish* suit, and were not entitled to notice of that suit or of the decree rendered therein. The Supreme Court of Arkansas held that the failure to make them parties, and the failure to notify them of the rendition of the decree, was a fraud on the court in the procurement of the decree, and constituted unavoidable casualty which prevented an appeal from the decree.

D.

In *Kersh Lake Drainage District v. Johnson*, 309 U.S. 485, the petitioners pleaded the decree in the *Fish* case as *res judicata* of the fact that they had paid their assessments in full and were not liable for further taxes. The only defense interposed by the respondents to the plea in that case was that they were not parties to the *Fish* suit, and therefore were not bound by the decree. This court held that they were not entitled to be made parties, or to be notified of the suit, and that the decree was *res judicata*. In the case at bar, which is between the same parties and was brought for the same purpose as the *Johnson* case, 309 U.S. 485, the petitioners pleaded the judgment of this court as *res judicata* of the fact that the *Fish* decree was *res judicata* of the issue involved. The Supreme Court of Arkansas holds that the judgment of this court is not *res judicata* of that issue, thereby denying full faith and credit to the judgment of this court.

E.

The decision of the Supreme Court of Arkansas that where a decree is pleaded as *res judicata*, and the defense that the decree was obtained by fraud is not interposed, and the Supreme Court of the United States adjudicates that the decree is *res judicata*, the parties may subsequently attack the decree on the ground that it was obtained by fraud, is in conflict with the applicable decisions of this court.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this court, directed to the Supreme Court of the State of Arkansas, commanding that court to certify and send to this court a full and complete transcript of the record of the proceedings of that court in *Kersh Lake Drainage District v. Johnson*, No. 6332, and *State Bank & Trust Company v. Holthoff*, No. 6474, to the end that these causes may be reviewed and determined by this court as provided by the statutes of the United States; and that the judgments of the Supreme Court of Arkansas be reversed by this court, and for such further relief as to the court may seem proper.

Dated this the 1st day of February, 1942.

A. J. JOHNSON, ET AL.,
Petitioners.

By CHAS. T. COLEMAN,
Counsel.



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Supreme Court of the United States

No. _____

A. J. JOHNSON ET AL, _____ *Petitioners,*

v.

KERSH LAKE DRAINAGE DISTRICT ET AL, _____ *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

The opinion of the Supreme Court of Arkansas ~~has~~ ^{is}
~~not been~~ officially reported, ~~but it appears in the record~~
at page _____. 157 SW (2d) 39

The date of the decree to be reviewed is December 8, 1941, and the date of the order denying a petition for a rehearing is January 12, 1942.

The jurisdiction of this court is invoked under the act of Congress of February 13, 1925, Chapter 229, 43 Statutes 936, 237 B. of the Judicial Code, 28 U.S.C.A. section 344 (b) relating to the issuance of writs of certiorari to bring up for review judgments of state courts of last resort.

A concise statement of the case appears in the preceding petition, which is hereby adopted and made a part of this brief.

POINTS AND AUTHORITIES RELIED ON.

I.

The chancery court of Lincoln county was without authority to permit an amendment to the pleadings to be filed, or to entertain a new suit in the nature of a bill of review, without express leave from this court.

Johnson v. Kersh Lake Drainage District,
198 Ark. 743,

Kersh Lake Drainage District v. Johnson,
309 U.S. 485,

Southard v. Russell, 16 How. 547,

Gaines v. Rugg, 148 U.S. 228,

In re Potts, 166 U.S. 263,

National Brick & Electric Co. v. Christensen,
254 U.S. 425,

Texas & Pacific Ry. v. Anderson, 149 U.S. 237,
13 Sup. Ct. 843,

Chaffin v. Taylor, 116 U.S. 567,

Kansas City Southern Ry. Co. v. Guardian Trust Co.,
281 U.S. 1, 50 Sup. Ct. 194,

Eastern Cherokees v. United States, 225 U.S. 572, 582.

II.

The judgment of this court in Kersh Lake Drainage District v. Johnson, 309 U.S. 485, is res judicata of all the issues involved.

Chicot County v. Baxter State Bank, 308 U.S. 371,
60 Sup. Ct. 317,

Cromwell v. County of Sac., 94 U.S. 351,

Case v. Beauregard, 101 U.S. 688,
Baltimore S.S. Co. v. Phillips, 274 U.S. 316,
 47 Sup. Ct. 600,
Grubb v. Public Utilities Commission, 281 U.S. 470,
 50 Sup. Ct. 374,
McIntosh v. Wiggins, 123 Fed. (2d) 316, (C.C.A. 8).

III.

The Supreme Court of Arkansas denied full faith and credit to the judgment of this court in the Johnson case.

Des Moines Nav. Co. v. Iowa Homestead Co.,
 123 U.S. 552,
Deposit Bank v. Frankfort, 191 U.S. 499.

IV.

Section 8246 of Pope's Digest is not applicable to this case.

Milliken v. Meyer, 311 U.S. 457, 61 Sup. Ct. 339.

V.

Whether or not the Supreme Court of Arkansas gave full faith and credit to the judgment of this court is a federal question that is reviewable by this court.

Stoll v. Gottlieb, 305 U.S. 165, 59 Sup. Ct. 134,
Toucey v. New York Life Insurance Co.,
 62 Sup. Ct. 139,
Deposit Bank v. Frankfort, 191 U.S. 499,
Cromwell v. County of Sac., 94 U.S. 351,
Case v. Beauregard, 101 U.S. 688,
Baltimore S.S. Co. v. Phillips, 274 U.S. 316,
 47 Sup. Ct. 600,
Grubb v. Public Utilities Commission, 281 U.S. 470,
 50 Sup. Ct. 374.

ARGUMENT.

I.

The chancery court of Lincoln county was without authority to permit an amendment to the pleadings to be filed, or to entertain a new suit in the nature of a bill of review, without express leave from this court.

Kersh Lake Drainage District v. Johnson, 309 U.S. 485, was a suit in the chancery court of Lincoln county by certain bondholders, who are the respondents in this proceeding, to collect additional taxes from certain lands in the drainage district. The suit was brought in the name of the *Kersh Lake Drainage District*. The chancery court held that the lands were liable for additional taxes, and that the decree of the same court in *Fish, et al v. Kersh Lake Drainage District* was not a bar to their collection.

The Supreme Court of Arkansas reversed the decree of the chancery court, on the ground that "the court erred in holding the lands of appellant subject to an additional tax."

Johnson, et al v. Kersh Lake Drainage District,
198 Ark. 743.

The bondholders obtained a writ of certiorari from this court to review the judgment of the Supreme Court of Arkansas. This court affirmed the judgment of that court.

Kersh Lake Drainage District v. Johnson,
309 U.S. 485.

This court issued its mandate to the Supreme Court of Arkansas which set forth that the cause "is hereby remanded to you, the said Judges of the Supreme Court of the State of Arkansas, in order that such proceedings may be had in said cause in conformity with the judgment and decree of this court."

The Supreme Court of Arkansas remanded the cause to the Lincoln chancery court with directions to enter a decree holding that the lands of the appellants were not subject to an additional tax. This was in conformity with the mandate of this court.

When the cause reached the chancery court the bondholders filed what they called an amendment to the complaint in the *Fish* suit. The purpose of this amendment was to eliminate certain lands from the decree in that suit. The bondholders also filed a new suit in the same court in which they sought to attack the *Fish* decree on the ground that it was obtained by fraud practiced on the court, in that the bondholders were not made parties to the suit and had no notice of its pendency, and the commissioners of the district were also landowners and were personally interested in the result of the suit. The chancery court held that the matters set forth in both proceedings were concluded by the judgment of this court in *Kersh Lake Drainage District v. Johnson*, 309 U.S. 485. The court thereupon dismissed the amendment to the complaint in the *Fish* suit, and dismissed the complaint in the new suit, and entered a decree in exact conformity with the mandate of this court in the case referred to.

The bondholders, the present respondents, prosecuted an appeal to the Supreme Court of Arkansas. That court reversed the decree of the chancery court and ordered it